



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, ST. PAUL DISTRICT  
332 MINNESOTA STREET, SUITE E1500  
ST. PAUL, MN 55101-1323

MVP

07 MAY 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Approved Jurisdictional Determination in accordance with the "Revised Definition of 'Waters of the United States'"; (88 FR 3004 (January 18, 2023) as amended by the "Revised Definition of 'Waters of the United States'; Conforming" (8 September 2023) ,<sup>1</sup> [MVP-2024-00449-ALH] [MFR 1 of 1]<sup>2</sup>

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.<sup>3</sup> AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.<sup>4</sup>

On January 18, 2023, the Environmental Protection Agency (EPA) and the Department of the Army ("the agencies") published the "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule"). On September 8, 2023, the agencies published the "Revised Definition of 'Waters of the United States'; Conforming", which amended the 2023 Rule to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023) ("*Sackett*").

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. For the purposes of this AJD, we have relied on Section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</sup> the 2023 Rule as amended,

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<sup>1</sup> While the Revised Definition of "Waters of the United States"; Conforming had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

<sup>2</sup> When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, the territorial seas, or interstate water that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</sup> USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

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as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

### 1. SUMMARY OF CONCLUSIONS.

- a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).
  - i. [Wetland A – 28,098 square feet](#)
  - ii. [Wetland B – 7,779 square feet](#)
  - iii. [Wetland C – 3,628 square feet](#)

### 2. REFERENCES.

- a. “Revised Definition of ‘Waters of the United States,’” 88 FR 3004 (January 18, 2023) (“2023 Rule”)
- b. “Revised Definition of ‘Waters of the United States’; Conforming” 88 FR 61964 (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S. \_\_, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. [The review areas are approximately 2-acres in size and are identified by the red polygons on the attached Figure 2. The review areas are located at 42.9212 N, -87.9293 W in the City of Oak Creek, Milwaukee County, Wisconsin. There are no other JDs associated with the review area.](#)

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [[N/A](#).]<sup>6</sup>

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. [[N/A](#)]

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<sup>6</sup> This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

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6. SECTION 10 JURISDICTIONAL WATERS<sup>7</sup>: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.<sup>8</sup> [[N/A](#)]
7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States in accordance with the 2023 Rule as amended, consistent with the Supreme Court's decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of "waters of the United States" in the 2023 Rule as amended. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.
  - a. Traditional Navigable Waters (TNWs) (a)(1)(i): [[N/A](#)]
  - b. The Territorial Seas (a)(1)(ii): [[N/A](#)]
  - c. Interstate Waters (a)(1)(iii): [[N/A](#)]
  - d. Impoundments (a)(2): [[N/A](#)]
  - e. Tributaries (a)(3): [[N/A](#)]
  - f. Adjacent Wetlands (a)(4): [[N/A](#)]
  - g. Additional Waters (a)(5): [[N/A](#)]

## 8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

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<sup>7</sup> 33 CFR 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions.

<sup>8</sup> This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

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- a. Describe aquatic resources and other features within the review area identified in the 2023 Rule as amended as not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5). Include the type of excluded aquatic resource or feature, the size of the aquatic resource or feature within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).<sup>9</sup> [[N/A](#)]

- b. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the 2023 Rule as amended (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

The wetlands are situated on a partially developed lot, surrounded by commercially developed lots. The USA Soils Hydric Class layer on the National Regulatory Viewer show the soils in the area being partially hydric (1-25%). The wetlands are not TNWs, territorial seas, or interstate waters and therefore are not (a)(1) waters. Wetland A continues offsite to the east, so that area was reviewed in detail. The National Regulatory Viewer Digital Elevation Model layer along with the National Wetland Inventory layer shows that Wetland A is confined by the existing development to the east of the delineated area, does not extend to any tributaries and is not drained by any discrete/confined surface water conveyances. Topographic maps and the wetland delineation report indicate that they are depressional wetlands surrounded by upland. The wetlands do not physically abut a relatively permanent paragraph (a)(2) impoundment or a jurisdictional (a)(3) tributary and are not separated from a jurisdictional water by a natural berm, bank, dune, or similar natural landform. Wetland A is approximately 685 linear feet south of a tributary to North Branch Oak Creek and Wetland B is approximately 1040 linear feet south. Wetland C is approximately 840 linear feet south of a tributary to North Branch Oak Creek. However, there are no ditches, swales, pipes, or culverts that connect the wetlands to downstream jurisdictional waters. The wetlands are non-tidal wetlands that do not have a continuous surface water connection to a relatively permanent jurisdictional water and as such do not meet the definition of adjacent and cannot be evaluated as an (a)(4) adjacent wetland; therefore, the wetlands are not jurisdictional under the 2023 Revised Definition of ‘Waters of the United States’; Conforming” 88 FR 61964 Final Rule.

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<sup>9</sup> 88 FR 3004 (January 18, 2023)

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9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
  - a. [[Office evaluation conducted 07 May 2024](#)]
  - b. [[Wetland Delineation by Wetland & Waterway Consulting, LLC. Dated April 15, 2022.](#)]
  - c. [[National Regulatory Viewer – USA Soils Hydric Class layer, Hillshade layer and DEM layer accessed on 07 May 2024.](#)]
10. OTHER SUPPORTING INFORMATION. [N/A](#)
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.




## Surface Water Data Viewer Map

MVP-2024-00449-ALH FIGURE 1 OF 2



### Legend

-  Municipality
-  State Boundaries
-  County Boundaries
-  Major Roads
  -  Interstate Highway
  -  State Highway
  -  US Highway
-  County and Local Roads
  -  County HWY
  -  Local Road
-  Railroads
-  Tribal Lands
-  Rivers and Streams
-  Intermittent Streams
-  Lakes and Open water

## Notes

0.8                      0                      0.38                      0.8 Miles

NAD\_1983\_HARN\_Wisconsin\_TM

1: 23,760

DISCLAIMER: The information shown on these maps has been obtained from various sources, and are of varying age, reliability and resolution. These maps are not intended to be used for navigation, nor are these maps an authoritative source of information about legal land ownership or public access. No warranty, expressed or implied, is made regarding accuracy, applicability for a particular use, completeness, or legality of the information depicted on this map. For more information, see the DNR Legal Notices web page: <http://dnr.wi.gov/legal/>



**MVP-2024-00449-ALH FIGURE 2 OF 2**

**LOCATION:** 6826 SOUTH 13TH STREET, OAK CREEK

**LEGAL DESCRIPTION:**

Part of the Northwest 1/4 of the Southwest 1/4 of Section 5, Township 5 North, Range 22 East, in the City of Oak Creek, Milwaukee County, Wisconsin.

Wetlands Delineated by Wetland  
& Waterway Consulting, LLC  
April 2022

**LEGEND**

① = DATA POINT

GRAPHICAL SCALE (FEET)

